IN THE

Supreme Court of the United States

OCTOBER TERM—1940

No. 129

MARJORIE FLEMING LLOYD-SMITH,
Petitioner,

against

DONALD BICKNELL, Receiver of the Bank of Saginaw, Saginaw, Michigan,
Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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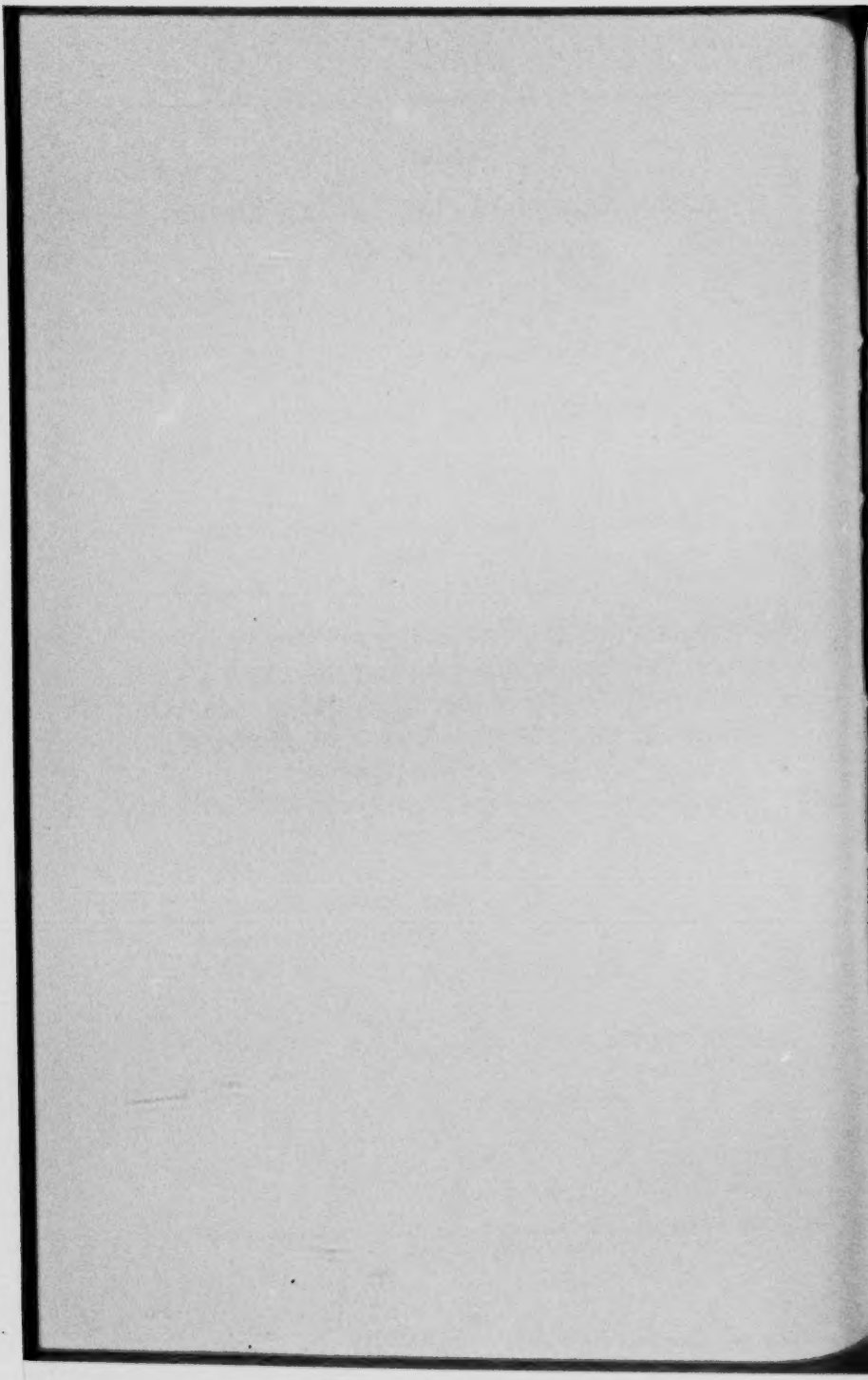

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The petition herein is an application by Marjorie Fleming Lloyd-Smith for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. That Court held:

"The third sentence of Rule 17(b)" of the Federal Rules of Civil Procedure gives to a receiver such as the respondent, "capacity to sue in a foreign district court" (R. 38).

The court, as detailed in the Statement below, made no decision on the question whether the respondent was "vested" with sufficient title to sue under the practice heretofore followed in the courts of the United States, but rather assumed for the purposes of argument, that he did not have adequate title.

The Question Involved

The brief of the petitioner sets forth the "question involved" on page 8. This question, which is a broad one, is particularized by the "specifications of error" (p. 8) and by the four point headings (pp. 8, 10, 12 and 16).

However, the question would be more precisely stated as follows:

Assuming without deciding that the respondent could not maintain this action under the practice heretofore followed in the federal courts, does the respondent have the right to maintain this action under the Federal Rules of Civil Procedure?

It is submitted that the points of this brief amply demonstrate that the foregoing is not a question upon which the issuance of a writ of certiorari may properly be based. Accordingly, we further submit that the petition should be denied.

Opinions Below

The United States District Court for the Eastern District of New York granted the petitioner's motion for judgment on the pleadings in an opinion reported at 29 F. Supp. 929 (1939) (R. 23-28).

The judgment of the District Court was reversed by the Circuit Court of Appeals for the Second Circuit, the opinion being reported in 109 F. (2d) 527 (1940) (R. 37-41).

It is from that reversal, which resulted in the denial of the motion for judgment on the pleadings, that the petitioner seeks to appeal.

Statement

One grave misapprehension is likely to arise from the petition and the supporting brief. It is said on page 10, that the Circuit Court of Appeals, "after quoting the

relevant statutory language", assumed that the Michigan statute did not vest the respondent with title. This, together with the statement appearing on page 9, that the respondent "did not get title to the assets", and the assertion, found on page 2, that the statute in question "did not vest such receiver with title to the assets", is calculated to lead the reader to believe that it has been determined that Mr. Bicknell did not have title to the cause of action alleged herein. Such is definitely not the fact. The Circuit Court of Appeals clearly stated in its opinion (R. 38): "We shall assume *for argument* that the plaintiff's [Mr. Bicknell's] appointment did not 'vest' him with title" (italics ours). In short, the assumption was obviously for the purposes of discussion and in no sense amounted to a determination that title was not vested in the respondent. The remainder of the opinion is similarly devoid of any holding that Mr. Bicknell lacked title to the instant cause of action. Hence, the petitioner's reiteration of Mr. Bicknell's lack of title is merely a claim and not a holding of the court.

POINT I

The issues herein are of such a nature as to require the denial of the petition for a writ of certiorari.

It is the general and accepted rule that the power of the Supreme Court to grant writs of certiorari should be sparingly exercised, and that it should be used only in cases of peculiar gravity and general importance, or to secure uniformity of decision.

Layne & Bowler Corp. v. *Western Well Works,* 261 U. S. 387 (1923), was a patent case involving an infringement situation. After discussing the alleged conflict between the fifth and ninth circuits, the Court found the decisions to be in harmony with each other and that "there was no ground for our allowing the writ of certiorari to add to an already burdened docket" (pp. 392, 393).

The opinion then proceeded to enunciate this important policy of the Supreme Court (p. 393):

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that *it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.*" (Italics ours.)

This proposition was firmly reiterated in *Magnum Import Co., Inc.* v. *Coty,* 262 U. S. 159 (1923). There the Court spoke in the following unequivocal language (p. 163):

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.* Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics ours.)

It is respectfully suggested that the petitioner herein is a member of the large group alluded to.

The conclusion reached in these two cases was subsequently reaffirmed in *Keller* v. *Adams-Campbell Co.,* 264 U. S. 314 (1924), where the Court said (pp. 319, 320), with respect to the situation then before it:

> "Such an ordinary patent case with the usual issues of invention, breadth of claims and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent. We therefore find ourselves mistaken in assuming that an important issue of general patent law under §4916, Rev. Stats., is here involved. The result is that an order must be entered dismissing the writ of certiorari as improvidently granted at the costs of the petitioner."

It is manifest from the petitioner's brief that no conflict between the circuits is herein involved. In fact, she makes no such contention. Keeping in mind, then, the foregoing principles, let us examine the reasons which she does advance as to "why this Court should grant the writ of certiorari" (pages 3-4 of the petition).

1. The decision below is in conflict with the prior decisions of this Court, stemming from *Booth* v. *Clark,* 17 How. 322 (1854).

2. The decision is in conflict with Rule 66 of the Federal Rules of Civil Procedure.

3. The decision makes a novel distinction between receivers, based upon the sources of their appointment.

4. The decision erroneously construes Rule 17(b) to apply to receiverships.

5. The decision is the first construction of Rule 66 and the first application of Rule 17(b) to a receivership.

6. There are a great number of receiverships and a great number of actions involving the right of foreign receivers to sue.

7. The question is important and requires an authoritative and elucidating opinion of this Court, for otherwise confusion and uncertainty in suits by foreign receivers in federal courts will result.

These "reasons" include within their purview all the specifications of error appearing on page 8 of the petitioner's brief, as well as the four point headings (pp. 8, 10, 12 and 16).

Reason number 1 is the same as the contention advanced in the petitioner's Point I, and it will be discussed briefly by our answer thereto in Point III, below.

Reasons numbers 2, 4 and 5 deal directly with the Rules and will be taken up in Point II, below. Reason number 3 will also be discussed therein.

Reasons numbers 6 and 7, which are interrelated, can be dealt with most conveniently at this juncture.

While there are many receiverships and suits by foreign receivers, as reason 6 states, and while the question involved herein is therefore of some importance (see reason 7, page 5), none of these factors has ever been adjudicated to be of sufficient gravity to sustain a petition for certiorari. The remainder of reason 7 would have to be demonstrated to show the petitioner to be entitled to the relief sought herein. However, no proof is advanced to show that "an authoritative and elucidating decision from this Court" is necessary to avoid "confusion and uncertainty."

Since the Circuits are admittedly not in conflict, there is neither confusion nor uncertainty. While the District Court was reversed, that fact has never been held to be of such force as to justify a writ of certiorari. *Indeed, it is significant, when one considers the foregoing cases, that the petitioner has cited no authority to show that this is the kind of case in which a writ of certiorari should be granted.*

Moreover, the statement that the Federal Rules of Civil Procedure are here involved is not a cogent reason, for, as we shall show in Point II, below, the rules involved herein are crystal clear as drawn by this Court and do not require a supplementary opinion to inform the bar of their meaning.

Furthermore, where, as here, the case does not fall within that class which should be determined by the Court of last resort, that tribunal deems it an obligation not to consider it on the merits. In *United States* v. *Rimer*, 220 U. S. 547 (1911), the Court declared (p. 548):

> "After giving the matter most careful consideration *because of the precedent as to future cases* which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, *our duty is* not to pass upon the merits of the case, but *to dismiss the writ of certiorari.*" (Italics ours.)

To grant the writ in the instant situation, we submit, would, under the *Rimer* case, require this Court to afford similar relief to every litigant whose case involved the Federal Rules of Civil Procedure and whose District Court judgment had been reversed by the Circuit Court of Appeals, for the petitioner has shown no basis for requesting this Court to consider the instant case, other than the reversal and the fact that the said rules are involved herein.

POINT II

The Circuit Court of Appeals correctly applied the Federal Rules of Civil Procedure.

Points II and IV of the petitioner's brief and reasons numbered 2, 4 and 5, above, deal with the Federal Rules of Civil Procedure. The two rules involved herein, to wit, 17(b) and 66, are set forth in full on page 11 of the petitioner's brief and will not be repeated here.

In Point II (pages 10-12) the petitioner urges that there was "no intent" to have the Rules change the former practice. To sustain this contention, the petitioner advances three arguments:

(a) Rule 66, by its terms, declares the practice as to receivers is unchanged (p. 11). The fallacy in this

argument is exposed when one reads the rule and finds that it refers to "administration of estates by receivers or by other similar officers *appointed by the court*" (italics ours). Hence, by the specific limitation placed in the rule as drawn by this Court, the old, formalistic practice was preserved only as to receivers *appointed by the court.* Other receivers (such as the respondent, who was appointed by the Michigan Banking Commissioner), fall under Rule 17(b) which, after referring to corporations and to individuals who are *not* acting in a representative capacity, provides that "in all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held". It is undisputed that this action could be maintained by the respondent under the law of New York, and that this action was brought in the United States District Court for the Eastern District of New York.

As stated by the Circuit Court of Appeals in its decision (R. 39):

> "Nor can we see how the defendant escapes the requirement that at least *some court* shall appoint the receiver; *we can find no underlying purpose in the rule* [*66*] *to induce us to disregard this explicit limitation,* assuming that any such would serve, if we could." (Italics ours.)

It is therefore clear that Rule 66, by its terms, has no application to the instant case, and no "intent" can be found to subvert the express language used.

(b) The petitioner also urges that the Hearings of the Judiciary Committee of the House of Representatives indicate no intention to change the law (p. 12). An inspection of the discussions alluded to will show that Mr. Tolman (the witness whose testimony is referred to) stated that Rule 17(b) did not change the law *on the amenability of labor unions to suit.* There is no basis in the testimony taken in those hearings for alleging that Rule 17(b) did not change the law on other matters.

(c) Finally, the petitioner invokes the authority of "Moore's Federal Practice" (p. 12). But even the quotation from that work which counsel set forth verbatim is expressly limited to "*chancery* receivers" (see third line of quotation on page 12 of petitioner's brief), i. e., receivers appointed by the court. Hence this text book supplies no "intent" which can be attributed to the rule makers to change the obvious meaning of the words they used.

Many more reasons could be advanced to show that the nebulous and invalid bases upon which counsel predicate their claim of "no intent to change the old practice" are inadequate to overcome the clear wording used by this Court in drawing the rules in question. Since this is a brief in opposition to a petition for certiorari, and not an argument on the merits, we shall mention only one such reason.

Rule 66 is one of the eight rules (64-71) which fall under Section VIII of the Federal Rules of Civil Procedure. Section VIII is entitled "Provisional and Final Remedies and Special Proceedings". Hence it is clear that Rule 66 refers to a provisional remedy, a final remedy or a special proceeding. In any of these three events, it refers exclusively to a proceeding before a court, for if the receivers alluded to in Rule 66 are appointed in connection with a provisional remedy (as we shall show below) or in connection with a final remedy or a special proceeding, they must, of necessity, be appointed by a court. To state that the appointment of a receiver by an authority other than a court is a provisional remedy, a final remedy or a special proceeding, is to exhibit a basic ignorance of the most elementary terminology of the law.

It is not to be assumed that the Supreme Court of the United States is chargeable with such a lack of understanding. On the contrary, it is evident that when adopting Rule 66 this Court, in setting up provisional and final

remedies and special proceedings, referred to receivers appointed in connection with such remedies or proceedings, i. e., receivers appointed by the court.

The foregoing discussion prescinds from a consideration of the precise nature of the receivership taken up in Rule 66, and shows that the rule can refer only to receivers appointed by the court, irrespective of whether there is involved a provisional remedy, a final remedy, or a special proceeding. However, we respectfully submit that the rule refers to the provisional remedy.

In New York there are four provisional remedies, arrest, attachment, injunction and receivers. 7 *Carmody's New York Practice* (2d ed. 1932) 2. Provisional remedies are the first group named in Section VIII of the Federal rules. The first rule thereunder (64) is entitled "Seizure of Person or Property", thus corresponding to arrest and attachment. The next rule (65) is "Injunctions", again conforming to the New York pattern of provisional remedies, and then follows Rule 66 entitled "Receivers". (Rule 67 proceeds to a matter other than provisional remedy, viz., "Deposit in Court".) Consequently, it is apparent that Rule 66 refers to the provisional remedy of receivers and has no application to receivers appointed by the executive branch of the government.

Accordingly, we see that Rule 66 was intended to relate to only those receivers who were appointed by a court, and that the petitioner is in error in her Point IV when she alleges that the rule has been misconstrued by the Circuit Court of Appeals. Moreover, Point IV urges (as does reason 3, set forth on page 5, *supra*) that the decision below has "created a novel and extraordinary distinction between a receiver appointed by a court and a receiver appointed by a State administrative officer." We prescind from the point that it may be that no such distinction exists, since the court left open the question of whether the words "*administration of estates*" in Rule 66, are broad enough to cover *the institution of a*

suit by a foreign chancery receiver. Waiving the point, then, that Rule 66 may not even cover the institution of an action by a *chancery* receiver, and assuming that the above-mentioned distinction has been made, it was created not by the decision below, but by the rules formulated by this Court. Hence the disparagement which counsel direct toward that distinction is in reality for the rules themselves.

It is, of course, natural, that counsel should be dissatisfied with the rules, since they were promulgated to discourage formalistic defenses, and the ground upon which the petitioner has sought to dismiss the complaint is manifestly unsubstantial, since the objection interposed is that the respondent did not have an ancillary appointment made in New York before he brought this action. Upon such a claim it is sought to defeat a suit for over $36,000. It is submitted that the formalism of *Booth* v. *Clark, supra,* the eighty-six year old case upon which counsel rely, was one of the very things which the Federal Rules of Civil Procedure were supposed to eradicate.

We therefore respectfully submit that the Circuit Court of Appeals correctly applied the Federal Rules of Civil Procedure herein.

POINT III

The decision below is not in conflict with the prior decisions of this court.

Point I of the petitioner's brief and reason 1, set forth on page 5, *supra,* state that the decision below is in conflict with *Booth* v. *Clark, supra,* and the cases that follow it. Such a contention is an obvious error. At the outset it must be realized that *Booth* v. *Clark* involved a *chancery* receiver, a receiver appointed by a court. Such receivers, unlike a statutory receiver, lacked sufficient title to sue in a foreign jurisdiction, under the practice heretofore followed. Accordingly, if one *assumes for the*

sake of argument, as did the court below, that the respondent was not vested with sufficient title to sue outside the state of his appointment, under the practice heretofore followed, then the Circuit Court of Appeals reached a different result than did this Court in *Booth* v. *Clark.* However, the decision below does not seek to overrule this Court, but merely follows the new rules, whereby this Court itself changed the practice as to receivers who (1) are appointed by some authority other than a court, and (2) are not vested with such title as is required by the case of *Converse* v. *Hamilton,* 224 U. S. 243 (1912), for a receiver to sue in a foreign jurisdiction.

Hence the decision below cannot in any proper sense be said to be in conflict with *Booth* v. *Clark* and the cases stemming from it.

Finally, the petitioner's Point III asserts that "the decision of the Circuit Court of Appeals is in conflict with the prior decisions of this Court which show that the curtailment of the extra-territorial powers of receivers is not a matter of capacity to sue." On pages 12-15 of their brief counsel undertake to demonstrate this proposition. Nevertheless, the lengthy quotations from *Booth* v. *Clark, supra,* and *Great Western Mining Co.* v. *Harris,* 198 U. S. 561 (1905), fail to produce even an intimation that this Court considers the right of a foreign receiver to sue to be a matter of "receivership administration" (as the petitioner would have us believe) rather than a matter of capacity to sue. The third and last case quoted and discussed by the petitioner is *McCandless* v. *Furlaud,* 293 U. S. 67 (1934). That case involved an objection to an ancillary receiver's capacity to sue. It was distinguished from *Booth* v. *Clark,* as counsel contend, but the distinction was based upon the ground that in the *McCandless* case an ancillary receiver was appointed, whereas in *Booth* v. *Clark* no such ancillary appointment was made.

It is therefore manifest that the distinction made between these two cases is not at all indicative of a

holding to the effect that the objection in *Booth* v. *Clark* was not an objection to the plaintiff's capacity to sue. Moreover, nowhere in petitioner's copious quotations is there found a statement to support her claim that the question involved in *Booth* v. *Clark* or similar cases is a matter of "receivership administration."

Consequently, it is evident that the decision below is not in conflict with the decisions of this Court which established the practice heretofore followed in the Federal Courts.

CONCLUSION

Since neither of the two Points (II and IV) made by the petitioner with respect to the Federal Rules of Civil Procedure is valid; since neither of the two remaining Points in her brief (dealing with the alleged conflict between the holding below and the prior decisions of this Court) can be supported; and since all seven reasons urged as grounds for granting a writ of certiorari have been demonstrated to be without force, it is submitted that, in view of the limitations placed upon the issuance of the writ by decisions of which those cited in our Point I are typical, the petition for a writ of certiorari in the instant case should be denied.

Respectfully submitted,

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